

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD E. HESS)	
Claimant)	
VS.)	
)	Docket No. 203,687
CONTINENTAL PLASTIC CONTAINERS)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent filed an application for Appeals Board review of Administrative Law Judge Steven J. Howard's August 22, 1997, Award. The Appeals Board heard oral argument in Kansas City, Kansas.

APPEARANCES

Claimant did not appear as he had settled his claim against the respondent on August 17, 1995. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk appearing for William A. Wolff of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Charles D. Vincent of Paola, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Administrative Law Judge's Award.

ISSUES

The Administrative Law Judge denied respondent's request for reimbursement from the Kansas Workers Compensation Fund (Fund) for workers compensation benefits paid to the claimant in a settlement hearing held before Special Administrative Law Judge Ernest Johnson on August 17, 1995. The Administrative Law Judge found the respondent had paid claimant compensation benefits on August 17, 1995, that were barred by the time limitations contained in K.S.A. 44-534 (Ensley).

The Administrative Law Judge also awarded, in favor of the Fund and against the respondent, attorney fees in the amount of \$2,945.30 pursuant to K.S.A. 1991 Supp. 44-566a(f).

The respondent contends, in a proceeding between the respondent and the Fund for relief of liability for injuries to handicapped employees pursuant to K.S.A. 1991 Supp. 44-567, that the time limitations contained in K.S.A. 44-534 (Ensley) do not apply. The respondent also argues the Fund does not have standing in a K.S.A. 1991 Supp. 44-567 proceeding to contest the issues between respondent and the claimant involving claimant's entitlement to compensation benefits. Therefore, the respondent contends the Fund is liable for reimbursement to the respondent, as stipulated by the parties, for 50 percent of the settlement paid to the claimant.

Respondent further argues, since the Fund is liable for a portion of the claimant's settlement, then the respondent has no liability for the Fund's attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The material facts of this case are not in dispute and are contained in a stipulation filed in the record by the parties.

On February 12, 1992, claimant suffered a work-related low-back injury while employed by the respondent. The respondent voluntarily provided claimant with medical treatment and temporary total disability benefits. Claimant received his last medical treatment for this injury on October 13, 1992. The last medical expense was paid by the respondent on December 30, 1992.

Claimant had suffered a prior low-back injury in 1973 that required surgical intervention. The respondent had knowledge of this preexisting injury and pursuant to K.S.A. 44-566a(c)(1) impleaded the Fund in this matter on August 23, 1994. Thereafter, in a settlement hearing held before Special Administrative Law Judge Ernest Johnson on August 17, 1995, the claimant and the respondent entered into a compromise settlement for claimant's work-related low-back injury. In addition to the temporary total disability compensation of \$939.71 and medical expense of \$3,494.20, already voluntarily paid, the

respondent paid claimant \$22,998.16 to settle any and all remaining workers compensation claims claimant had as a result of the February 12, 1992, injury.

The Fund was represented at the settlement hearing, and all issues between the respondent and the Fund were reserved for further determination. Also contained in the stipulation filed in the record, the parties agreed, that if liability was assessed against the Fund, the Fund would reimburse the respondent for 50 percent of the total settlement paid to claimant including 50 percent of \$89.10 in costs.

In the case at hand, the respondent settled claimant's case on August 17, 1995, more than three years after claimant's February 12, 1992, accident and more than two years after respondent paid claimant's last medical expense on December 30, 1992. The parties stipulated that no application for hearing was filed before the August 17, 1995, settlement.

The Fund argued and the Administrative Law Judge found the provisions of K.S.A. 44-534 (Ensley) applied and the Fund was not liable for any of the settlement between the respondent and the claimant. The Administrative Law Judge found the respondent paid a claim to the claimant on August 17, 1995, that was barred by the time limitation provisions contained in K.S.A. 44-534 (Ensley). Therefore, the Application for Hearing filed by the respondent on August 31, 1995, requesting reimbursement from the Fund for all or a portion of the settlement between the respondent and claimant was denied.

The respondent impleaded the Fund in this case on August 23, 1994, pursuant to K.S.A. 44-566a(c)(1). Because of claimant's preexisting low-back injury, the respondent alleged claimant was a handicapped employee, it had knowledge of the handicap, it retained the claimant after acquiring such knowledge, and the preexisting impairment either caused or contributed to claimant's work-related injury. See K.S.A. 1991 Supp. 44-567. Respondent sought reimbursement from the Fund for all or a portion of the compensation benefits respondent voluntarily paid to the claimant. K.S.A. 44-569a(Ensley).

The Appeals Board finds the dispositive issue of this case is whether the K.S.A. 44-534 (Ensley) time limitations apply to issues between the Fund and respondent for compensation voluntarily paid to the claimant where there was no dispute as to claimant's right to compensation or any issue in regard to benefits due the claimant under the Workers Compensation Act. In deciding this issue, the Appeals Board is mindful that statutory provisions regarding Fund liability are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. See Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).

In this case, there was no dispute between the respondent and claimant concerning claimant's right to compensation under the Workers Compensation Act. Respondent points out it voluntarily provided claimant with the necessary medical treatment for his

work-related injury and temporary total disability benefits for the time he was unable to work. Respondent then returned the claimant to his regular work and provided claimant with permanent partial disability benefits based on his functional impairment as required by K.S.A. 1991 Supp. 44-510e(a). An Application for Hearing was not filed because there was no disagreement on claimant's right to compensation as provided by the Act. In other words, the respondent freely and voluntarily paid the necessary workers compensation benefits which is encouraged by public policy and the law. See Castoreno v. Western Indem. Co., Inc., 213 Kan. 103, 109, 515 P.2d 789 (1973).

K.S.A. 44-534 (Ensley) provides that whenever the employer, worker, or insurance carrier cannot agree upon the worker's right to compensation or upon any issue in regard to benefits due the worker under the Workers Compensation Act, the employer, worker, or insurance carrier may file an application for hearing in the office of the Director of Workers Compensation. However, no proceeding for compensation shall be maintained under the Workers Compensation Act unless an application for hearing is filed within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.

The Appeals Board finds the time limitations contained in K.S.A. 44-534 (Ensley) do not apply, where, as in this case, there is no disagreement between the employee and the employer and its insurance carrier upon any issues to the claimant's right to compensation benefits. Therefore, K.S.A. 44-534 (Ensley) is not applicable under these circumstances and the Appeals Board concludes the Administrative Law Judge's Award should be reversed. The Fund is ordered to reimburse the respondent for the stipulated 50 percent of all workers compensation benefits paid by the respondent as set forth in the settlement hearing transcript of August 17, 1995, plus 50 percent of \$89.10 in costs.

The Appeals Board also concludes, because of the above findings, that the Administrative Law Judge's Award of attorney fees in favor of the Fund and against respondent should be reversed. The Fund shall be responsible for the payment of its own attorney fees.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's Award entered on August 22, 1997, should be, and is hereby, reversed and the Fund is ordered to reimburse the respondent for 50 percent of all of the workers compensation benefits paid claimant in the settlement hearing held on August 17, 1995, plus 50 percent of \$89.10 in costs.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John David Jurcyk, Lenexa, KS
Charles D. Vincent, Paola, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director